No. 15221

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN FARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court
for the District of Oregon.

Honorable William G. East, Judge.

WILLIAMS & ALLEY,
DAVID R. WILLIAMS,
1212 Failing Building,
Portland 4, Oregon,
For Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-57

INDEX

Page

Jurisdiction 1

Statement of the Case 2

Statement of Points on Appeal:

The Trial Court Erred in Its Findings, Conclusions and Decree Dated March 23, 1956, in Failing to Award Appellant Adequate General and Special Damages 4

Summary of Argument 4

Argument:

(a) Award Grossly Inadequate to Compensate for Injuries, Disability, Wage Loss and Pain Which Trial Court Found Appellant Sustained 5

(b) Under the Evidence and Findings of Fact Respecting Injuries, Full Damages Should Be $96,000.00 8

(1) Wage Loss to Date of Trial Was $24,994.13 .. 8

(2) Future Wage Loss Was $57,532.85 12

(3) Award for Pain and Suffering and Disability Should Be $15,000.00 16

(c) Appellate Court Should Award Compensatory Damages 19

Conclusion 20

TABLE OF AUTHORITIES

Page

Cases

Drlik vs. The Imperial Oil, Ltd. (D.C. Ohio, 1955), 141 F.S. 388 ..... 13, 18, 20

Drowne vs. Great Lakes Transport Corp. (C.C.A. 2d, 1925), 5 F. 2d 58 19

Fauntleroy vs. Argonaut S.S. Line (C.C.A. 4th, 1929), 31 F. 2d 941 19

Heredia vs. Davis (C.C.A. 4th), 12 F. 2d 500 19

Hilderbrand vs. U.S.A. (D.C., N.Y., 1954), 134 F.S. 514, affirmed (C.C.A. 2d, 1955), 226 F. 2d 215 ..... 8, 20

Imperial Oil Ltd. vs. Drlik (C.C.A. 6th, 1956), 234 F. 2d 4 ..... 18, 20

Johannsson vs. U.S.A. (D.C., N.Y., 1949), 1949 A.M.C. 1802 ..... 8, 17, 20

Lundy vs. Calmar S.S. Corp. (D.C., N.Y., 1951), 96 F.S. 251 20

McCarthy vs. U.S.A. (D.C., N.Y., 1950), 88 F.S. 251 20

Menefee vs. W. R. Chamberlin Co. (C.C.A. 9th, 1950), 183 F. 2d 720 19

Menefee vs. W. R. Chamberlin Co., 176 F. 2d 828, 49 A.M.C. 1388 19

Rice Growers' Association of California vs. Rederiaktiebolaget Trode, 171 F. 2d 662 19

The SPOKANE (C.C.A. 2d), 294 F. 242, cert. den., 264 U.S. 583, 44 S.Ct. 332, 68 L.Ed. 861 19

Standard Oil Company vs. Southern Pacific Co., 268 U.S. 146, 155, 45 S.Ct. 465, 69 L.Ed. 890 19

TABLE OF AUTHORITIES (Cont.)

Page

Stokes vs. U.S.A. (D.C., N.Y., 1944), 55 F.S. 56, modified (C.C.A. 2d, 1946), 144 F. 2d 82 20

U.S.A. vs. Luehr (C.C.A. 9th, 1953), 208 F. 2d 138 ..... 8, 15, 19

U.S.A. vs. Puscedu (C.C.A. 5th, 1955), 224 F. 2d 5 ..... 8, 20

U.S. Fidelity & Guaranty Co. vs. U.S.A. (C.C.A. 2d, 1945), 152 F. 2d 46 19

STATUTES

46 U.S.C.A., Sec. 742 to 752 1
46 U.S.C.A., Sec. 688 2

No. 15221

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN FARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court
for the District of Oregon.

Honorable William G. East, Judge.

JURISDICTION

This is an appeal from a final decree entered by the District Court in a libel in personam filed pursuant to the Suits in Admiralty Act.

46 U.S.C.A., Sec. 742 to 752.

The cause involves the liability of the respondent-appellee, the United States of America, for an jury to a seaman which occurred in the course of

the seaman's employment with appellee on April 6, 1952, in the harbor of Sasebo, Japan.

46 U.S.C.A., Sec 688.

Decree was entered in favor of libelant-appellant on March 23, 1956. Notice of Appeal and Petition for Appeal were filed on June 20, 1956, and Order Allowing Appeal entered the same day. In his Notice of Appeal and Petition for Appeal, this appellant has indicated that he desires only to review one question involved in the cause, towit: the gross inadequacy of general and special damages awarded libelant by the trial court.

STATEMENT OF THE CASE

Appellant was very seriously injured and permanently disabled by an accident occurring on April 6, 1952, in the harbor of Sasebo, Japan. He was then employed as Second Assistant Engineer aboard the S.S. AUGUSTIN DALY, a Liberty Ship owned and operated by appellee. At the aforementioned time and place, another crewman aboard appellee's vessel negligently fell a distance of approximately twenty feet from a "Jacob's" ladder and landed on appellant's head and shoulders.

The crushing blow rendered appellant unconscious for several hours and caused multiple fractures to his spine and clavicle, together with extensive soft tissue injuries to the back and shoulder. Appellant was removed to shore and was first hos-

pitalized in Japan for 19 days. While in severe pain, he was repatriated to the United States, arriving here approximately two months after his injury. He was thereafter placed in the United States Public Health Service Hospital in Seattle, Washington, four times during the ensuing 13 months for casts and treatment. He was also given outpatient treatment at the United States Public Health Service Clinic in Portland, Oregon, between the periods of his hospitalization. The total period of his hospitalization exceeded three months. After the United States Public Health Service refused him further treatment, appellant, Farley, obtained the services of a private physician, Dr. Richard F. Berg, an orthopedic specialist (Tr. 196-199, 206). Under Dr. Berg's care, Farley undertook a series of physical therapy treatments which lasted nearly a year, and was being so treated at the time of trial (Tr. 200).

Except for one night's employment as a relief Port Engineer, appellant was totally and continuously unemployed from the date of injury on April 6, 1952 to the time of trial, July 27-29, 1955 (Tr. 197, 198, 206).

Stated briefly, the trial court found that by reason of appellee's negligence, appellant:

(1) Was permanently and totally disabled from following his usual occupation or any other heavy employment.

(2) Was permanently disabled to the extent to fifty percent from performing any light duty employment.

(3) Had suffered considerable pain and distress and would permanently suffer pain and distress.

(4) Was permanently deprived of his earnings as a second assistant engineer in the approximate amount of $700.00 per month.

The trial court awarded appellant the woefully inadequate sum of $8500.00 as general and special damages for his loss of wages to the time of trial, loss of anticipated future wages, and permanent pain, suffering and disability.

STATEMENT OF POINTS ON APPEAL

The Trial Court Erred in Its Findings, Conclusions and Decree Dated March 23, 1956, in Failing to Award Appellant Adequate General and Special Damages

SUMMARY OF ARGUMENT

(a) The award of $8500.00 was grossly inadequate to compensate appellant for the loss of past and future wages, and pain, suffering and disability, caused by the injuries and permanent disability which the trial court found appellant sustained.

(b) Under the evidence and Findings of Fact Nos. 7, 8, and 9, the trial court should have found appellant's full damages to be in an amount not less than $96,000.00.

(1) Wage loss to date of trial was $24,349.59.

(2) Future wage loss was $57,532.85.

(3) Award for pain, suffering and disability should be at least $15,000.00.

(c) This Court has the power to and should rectify the trial court's error by an adequate award of compensatory damages.

ARGUMENT

(a) Award of $8500.00 Grossly Indequate to Compensate Appellant for Loss of Past and Future Wages, and Pain, Suffering and Disability, Occasioned by Injuries and Permanent Disability Which Trial Court Found Appellant Sustained.

The trial court's findings respecting appellant's injuries and disability are set forth in Findings of Fact Nos. 7, 8, and 9 (Tr. 40, 41) as follows:

> "7. That libelant's injuries proximately caused by respondent's servant's negligence were a concussion and nervous shock, fracture of the right clavicle, fractures of the seventh, eighth, tenth and twelfth dorsal vertebrae, a severe wrenching and tearing of the muscles, ligaments, tendons, and soft tissues of the right shoulder and back, an irritation of the nerves in the back area, a traumatic capsulitis or fibrosis of the right shoulder joint, and an aggravation of a dormant pre-existing osteoarthritis of the spine.
>
> "8. That by reason of said injuries, libelant has suffered considerable pain and distress, will permanently suffer pain and distress, has sustained a permanent limitation of motion in

the right shoulder joint, a permanent limitation of motion and instability of the dorsal spine, a loss of strength and gripping function of the right arm and hand, and has become totally and permanently disabled from following his usual and ordinary occupation of merchant marine engineer or any other heavy employment, and is further permanently disabled to the extent of fifty per cent from performing light duty employment.

"9. That at the time of libelant's said injury he was a healthy robust man, capable of engaging in strenuous labor, of the age of 58 years, with a life expectancy under United States Life Tables, 1949-1951, of 17.05 years, earning the approximate sum of $700.00 per month, exclusive of room and board, as a second assistant marine engineer; that libelant was, excepting one day, unemployed from the date of his injury, April 6, 1952, to the date of trial, July 27, 1955, as a result of said injuries; that since August 13, 1952, libelant has lost wages and will lose further wages by reason of said injuries."

These findings are fully supported by the testimony of appellant and the two medical experts called by the respective parties. However, these findings are wholly inconsistent with Finding of Fact No. 10 (Tr. 41) which finds appellant's general and special damages to be in the amount of $8,500.00.

There was no question that appellant Farley sustained the clavicle fracture and the multiple compression fractures of his dorsal vertebrae from Potts' body striking him on the head and shoulders. Both doctors testified that a traumatic injury suf-

ficient to cause multiple compression fractures could reasonably be expected to cause extensive permanent damage to the muscles, ligaments and other soft tissues in Farley's right shoulder and back. The preexistence of osteo-arthritis to an extent normally found in a man of appellant's age and occupation was reported by both doctors. The testimony of Dr. Berg was that such a preexisting condition was probably aggravated by a severe traumatic injury such as appellant received. Both doctors testified that appellant will probably always have pain because of his injury in addition to total disability from heavy employment. Dr. Berg further testified that appellant's injuries will prevent him from following light employment to the extent of fifty percent.

It was stipulated in the Pretrial Order (Tr. 17) and in open court (Tr. 212) that at the time of his injury appellant was earning base wages of $435.89 per month plus overtime at the rate of $1.96 per hour and his room and board on the vessel. As will hereinafter be set forth in detail, the undisputed evidence showed that appellant's average monthly earnings, exclusive of room and board, were approximately $700.00 at the time of his injury, and that his average annual employment was between ten and eleven months. The evidence was further undisputed that the base wages for appellant's employment and the overtime pay applicable thereto were substantially raised by an industry wage agreement effective June 16, 1953.

The trial court's award of damages for past and future wage loss, pain, suffering and disability, was approximately equivalent to appellant's anticipated loss of wages for one year. As such, the award of damages (Finding of Fact No. 10) was wholly devoid of evidentiary support.

(b) Under Evidence and Findings of Fact Respecting Injuries Full Damages Should Be Not Less Than $96,000.00.

The trial court entered no findings respecting the various elements of general and special damages for which the award was made. Where damages are fixed by a court it is the usual practice to make separate evaluations of the several elements of damages which constitute the award. **U.S.A. vs. Luehr** (C.C.A. 9th, 1953), 208 F. 2d 138; **Johannsson vs. U.S.A.** (D.C. N.Y., 1949), 1949 A.M.C. 1802; **U.S.A. vs. Puscedu** (C.C.A. 5th, 1955), 224 F. 2d 5; **Hilderbrand vs. U.S.A.** (D.C. N.Y., 1954), 134 F.S. 514, affirmed (CC.A. 2d, 1955) 226 F. 2d 215.

We shall set forth under appropriate subheadings the damages to which appellant is entitled under the evidence and Findings of Fact Nos. 7, 8, and 9:

(1) Wage Loss to Date of Trial Was $24,994.13.

The printed portion of appellant's Exhibit No. 7 (Tr. 457) consists of a summary of wages earned by Farley aboard appellee's vessel, S.S. AUGUSTIN DALY, in the year of his injury 1952. The title of

the exhibit erroneously states the period to commence February 2, 1950, which should read "February 2, 1952," the date appellant signed aboard the vessel. Although this exhibit and appellant's testimony (Tr. 216-218) show that he sustained a substantial wage loss between the date of his injury, April 6, 1952, and the end of the voyage (August 13, 1952), no claim is made for lost wages prior to August 13, 1952.

The amount of appellant's base wages ($435.89 per month) and hourly rate of overtime pay ($1.96) at the time of his injury were, as aforementioned, agreed upon by the parties. The appellant introduced evidence which was uncontradicted concerning his average monthly overtime earnings and the average number of months of his employment per year.

Appellant testified that his average overtime earnings were between $200.00 and $250.00 per month at the time of his injury (Tr. 211, 212). This testimony was borne out by appellant's Exhibit 7 (Overtime Statements Aboard S.S. TRANSOCEANIC), which covers appellant's overtime earnings in the year immediately preceding his injury. This exhibit shows that he earned 778 hours of overtime aboard the S.S. TRANSOCEANIC bebetween May 16, 1951 and December 16, 1951, a period of six months, or an average monthly overtime of 129.8 hours. It is further shown by appellant's Exhibit 7 (Pay Data from W. R. Chamberlin

& Co., Tr. 457) that he earned base wages and overtime aboard the S.S. AUGUSTIN DALY of $1,361.55 from the beginning of his employment to the date of his injury, a period of two months and four days, plus his room and board valued at $139.85 during said period, a total of $1,501.40. Appellant's 1951 income, as reported on his Federal Tax Return, was $7,648.73 (Tr. 213) for his eleven months of employment aboard the S.S. TRANSOCEANIC, an average of $695.34 per month. Appellant further testified that his average annual employment varied between ten and eleven months. It follows that appellant's wage loss for the year August 14, 1952 to August 13, 1953 should be computed as $700.00 per month x 10.5 months, a total of $7,350.00.

Appellant's Exhibit 5 (entitled "Agreement Between National Marine Engineers' Beneficial Association and Pacific Maritime Association, dated November 1, 1951, effective date: June 16, 1953) shows that the basic wage for second assistant marine engineers sailing on Liberty ships was on June 16, 1953 increased to $531.23 per month (also see Tr. 214-215). The "Liberty" (Class C) vessel category is selected because appellant's U. S. Coast Guard Continuous Discharge Book (Appellant's Exhibit 6) shows that the last seven vessels on which he sailed were "Liberty" ships (also see Tr. 108). The above referred to Exhibit 5 also shows that the overtime pay scale was changed from $1.96 per hour to $3.29 per hour effective June 16, 1953.

The latest industry wage agreement in effect at the time of trial (also appellant's Exhibit 5, effective June 16, 1954) shows that the same pay scale as was adopted on June 16, 1953, was then in effect both as to monthly wages and overtime.

If we assume that appellant's monthly overtime would have remained at the 1951 level of 129.8 hours (appellant's Exhibit 7), by application of the new industry wage agreement, he would have had monthly overtime pay of $427.04 after June 16, 1953, or combined earnings of $958.27. However, assuming conservatively that appellant would have earned only 100 hours of overtime per month after June 16, 1953, his earnings from this source would have been approximately $329.00 per month. His combined earnings would then have been $860.23 per month. This figure multiplied by 10.5 months (appellant's average annual employment) shows an annual wage loss of $9,032.41 for the year August 14, 1953 to August 14, 1954.

For the period August 14, 1954 to the date of trial, July 27, 1955, appellant's wage loss would be 348/365ths of $9,032.41, or $8,611.72.

We feel that no reasonable question can be raised concerning appellant's total disability for gainful employment from the date of his injury to the time of trial. The medical witnesses called by the respective parties stated that appellant is permanently and totally incapacitated from any heavy employment such as he has followed at sea for the

thirty years preceding his injury. Further, appellant was following a course of physical therapy treatment prescribed by his physician up to the time of trial which had improved the disability of his right shoulder and arm to some extent. He attempted to return to work (one engineer's night watch in September 1953—Tr. 197, 198, 206) and was found unable to perform the work. Prior to his treatment by Dr. Berg commencing in 1954, the marked disability of his right shoulder, together with his extensive and painful back injuries, prevented any other employment.

Appellant's special damages shown by the evidence are thus summarized as follows:

Wage Loss, August 14, 1952 to August 13, 1953	$ 7,350.00
Wage Loss, August 14, 1953 to August 13, 1954	9,032.41
Wage Loss, August 14, 1954 to July 26, 1955	8,611.72
TOTAL	$24,994.13

It is to be noted from the printed excerpt from Respondent's Brief (Tr. 29) that appellee's estimate of Farley's wage loss during this period was $15,000.00.

(2) Future Wage Loss Was $57,532.85.

As was previously pointed out, there was no substantial conflict between the medical experts as to the extent of appellant's permanent total disability from his customary occupation or from any

strenuous employment. As aforementioned, the medical evidence and the Court's findings were that appellant is permanently disabled to the extent of fifty percent from performing light duty employment.

The evidence was clear that no definite date of retirement is fixed by law or practice for a marine engineer (Tr. 384, 385, 393, 394, 465, 466). The duties of a second assistant marine engineer require occasional, but not continuous, heavy labor (Tr. 67). Appellant testified that he expected to go to sea for at least ten or twelve more years from the date of his injury, or until 1962 or 1964 (Tr. 396). If the shorter period is taken, we find that in 1962 appellant will be 68 years of age. From 1955 to 1962 is a period of seven years during which appellant would probably earn $9,032.41 per year, as previously computed, or $63,226.87.

The next question is whether, and to what extent, this amount should be reduced by the earning ability which appellant still possesses. Just what employment a man of appellant's age, training, and physical disability would be able to find is extremely tenuous. What employer would hire a disabled marine engineer who is able to do only half-time light duty employment? As was stated in the case of **Drlik vs. The Imperial Oil, Ltd.** (D.C. Ohio, 1955), 141 F.S. 388:

> "We cannot expect that employers will invent jobs to fit the particular kind of physical incapacities from which this man suffers as the result of this injury."

However, it is fair to assume that the part-time light duty employment which appellant might reasonably be expected to obtain would not produce earnings in excess of $150.00 per month. It follows that an extremely conservative estimate of appellant's reduction in earning ability by reason of this accident would be eighty percent. Accordingly, a corresponding twenty percent reduction in appellant's probably anticipated earnings during the period July 1955 to July 1962 ($63,226.87) would result in a net figure of $50,581.50.

Appellant was 58 years of age at the time of his injury and his average life expectancy according to United States Life Tables, 1949-1951 (Appellant's Exhibit 10) was 17.05 years. Appellant stated that, following his retirement from the sea, he would expect to stand night watches on ships in port as a relief engineer. It was stated by both appellant (Tr. 396) and by Captain Larson, expert witness called by appellee (Tr. 385), that such is the common practice by the older marine engineers. Inasmuch as appellant's only trade or calling is that of marine engineer, it is reasonable to assume that he would continue to follow this occupation as long as his physical ability permitted. The compensation for such work is shown in the latest industry wage agreement (Appellant's Exhibit 5, page 21), effective date: June 16, 1954—Tr. 395) to be $2.92 per hour, or $23.36 for a eight-hour shift. Relief engineers are employed in American ports so that the engine room crew of the vessel

may be given shore liberty (Tr. 394, 395). If appellant worked only 13 days per month as a relief engineer, he would earn in excess of $300.00 per month. Since he is incapable of performing these duties and can perform only half-time light duty employment, his earning ability during this period has been impaired at least fifty percent. Appellant is therefore entitled, at the very least, to compensation for a loss of earnings at the rate of $150.00 per month for the period from age 68 to age 75. For the seven years involved, this amount totals $12,600.00.

The anticipated wage losses of $50,581.50 and $12,600.00, totalling $63,181.50, should then be subjected to the annuity computation at the customary three percent discount rate. The amount of $57,532.85 results from such computation which appellant represents to be his true future wage loss.

It is again to be observed from the printed excerpt from Respondent's Brief (Tr. 29) that appellee makes a more conservative estimate of appellant's future wage loss: $20,000.00.

We submit that appellant's computation of future wage loss is in conformity with that approved by this court in the 1953 case of **U.S.A. vs. Luehr,** cited **supra.** An allowance for progressive decline in earning ability has been made without regard to the continuing decrease in the purchasing power of money. If consideration is given to the ever ascending spiral of wages and prices, appellant's estimate of future wage loss has indeed been conservative.

(3) Award for Pain, Suffering and Disability Should Be at Least $15,000.00.

As to an award for pain and suffering, the evidence showed that appellant has suffered varying degrees of pain ever since his injury (Tr. 189, 207). Further, his injuries, and particularly the multiple spinal fractures, were very serious and required his hospitalization in Japan and transportation while in considerable pain back to the United States (Tr. 188-194). Upon his arrival in this country approximately two months after his injury, appellant became a bed patient in the United States Public Health Service Hospital in Seattle where he was placed in a full body cast for approximately 2 months (Respondent's Exhibit 5 and Tr. 194). During the ensuing thirteen months, appellant was hospitalized in the same facility on three additional occasions for periods of time varying between 10 and 22 days (Respondent's Exhibit 5). Between these periods of hospitalization appellant reported to the United States Public Health Service Clinic in Portland for outpatient treatment a total of 95 different times (Respondent's Exhibit 6). After the United States Public Health Service refused him further treatment (Tr. 196), appellant contacted a private physician for additional medical care (Tr. 199).

Under the advice of Dr. Richard F. Berg, an orthopedic specialist, appellant underwent a series of extensive physical therapy treatments (Tr. 280-281) which commenced in September 1954 and con-

tinued to the date of trial. (Libelant's Exhibit 9 and Tr. 200-202). Appellant drove from his home to Portland (a distance of 12 miles) for the treatments which were given between three and five times per week over a ten month period. At the time of trial, appellant had considerable pain in his back upon bending, lifting, prolonged standing, or the continued use of his right arm. Over three years after his injury, appellant obtained relief from pain only by lying down, and was assisted in doing household chores by wearing a back brace (Tr. 209). In the opinion of the two orthopedic specialists called as witnesses by the respective parties, appellant's pain will last for the remainder of his life (Tr. 292, 368).

In addition to this permanent pain, appellant's disability will seriously restrict him from enjoying normal diversionary activities. This is sometimes recognized as a separate element of damages under the heading of "disability" or "loss of enjoyment." **Johannsson vs. U.S.A.,** 1949 A.M.C. 1802. In the last above cited case, the injured seaman sustained the loss of a leg. In our view, appellant's loss is much more disabling because he must always live with an injured back which causes him pain upon movement. Appellant is entitled to the comfort of his later years free from unnecessary pain, discomfort, and disability. The loss of life's enjoyment by becoming a premature invalid or partial cripple is a compensable element of damages.

The case of **The Imperial Oil, Ltd. v. Drlik** (C.C.A. 6th, 1956), 234 F. 2d 4, is perhaps the latest Court of Appeals case wherein a trial court's award for pain and suffering was considered at length. Therein the Court of Appeals for the Sixth Circuit approved a formula used by the trial court (**Drlik vs. The Imperial Oil, Ltd.,** 141 F.S. 388) for finding damages for pain and suffering sustained by a 64-year old dock hand. The Court computed the award for pain and suffering as follows:

$100.00 per day for the first month of hospitalization.
$50.00 per day for the second month of hospitalization.
$20.00 per day for the next four months of hospitalization.
$100.00 per month after discharge from the hospital, and until the time of trial.
$100.00 per month for libelant's life expectancy on a 3% annuity basis.

The ascertainment of an amount which will adequately compensate appellant for his past and future pain, suffering and disability rests within the sound discretion of this Court. It is earnestly and respectfully suggested that, by virtue of the violent character of his injury, the lengthy course of his medical treatment, and the permanent character of his pain and loss of enjoyment, a compensatory award therefor should be at least $15,000.00.

(c) Appellate Court Can and Should Award Compensatory Damages.

An appellate court may increase an award in admiralty.

> **Standard Oil Company vs. Southern Pacific Co.,** 268 U.S. 146, 155, 45 S.Ct. 465, 69 L.Ed. 890;
> **The Spokane** (C.C.A. 2d), 294 F. 242, **cert. den.,** 264 U.S. 583, 44 S.Ct. 332, 68 L.Ed. 861;
> **Drowne vs. Great Lakes Transport Corp.** (C.C.A. 2d, 1925), 5 F. 2d 58;
> **Fauntleroy vs. Argonaut S.S. Line** (C.C.A. 4th, 1929), 31 F. 2d 941;
> **Menefee vs. W. R. Chamberlin Co.** (C.C.A. 9th, 1950), 183 F. 2d 720.

The cases of **U. S. Fidelity & Guaranty Co. vs. U.S.A.** (C.C.A. 2d, 1945) 152 F. 2d 46, and **Heredia vs. Davis** (C.C.A. 4th) 12 F. 2d 500, are authority for an appellate court's increase of an inadequate award for plain and suffering.

This Court has jurisdiction to and should correct the trial court's error by rendering an adequate award which is truly compensatory. A good statement of this power of final disposition is contained in two recent admiralty cases decided by this Court: **Menefee vs. W. R. Chamberlin Co.,** 176 F. 2d 828, 49 A.M.C. 1388, and **Rice Growers' Association of California vs. Rederiaktiebolaget Trode,** 171 F. 2d 662:

> " 'This Court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to

make such disposition of the case as justice may at this time require;' and 'The rule is the more insistent, because in admiralty cases are tried **de novo** on appeal.' "

An award should be made by this court in conformity with well-recognized standards for ascertainment of damages. As a guide to the Court, cases containing a carefully reasoned approach to damages in seamen's injury cases are:

U.S.A. vs. Luehr (C.C.A. 9th, 1953), supra;
Johannsson vs. U.S.A. (D.C. N.Y., 1949), supra;
U.S.A. vs. Puscedu (C.C.A. 5th, 1955), supra;
Drlik vs. Imperial Oil, Ltd. (D.C. Ohio, 1955), supra, modified in **Imperial Oil, Ltd. vs. Drlik** (C.C.A. 6, 1956), supra;
Hilderbrand vs. U.S.A. (D.C. N.Y., 1954), supra, affirmed (C.C.A. 2d, 1955), supra;
Lundy vs. Calmar S.S. Corp. (D.C. N.Y., 1951), 96 F.S. 19;
McCarthy vs. U.S.A. (D.C. N.Y., 1950), 88 F.S. 251;
Stokes vs. U.S.A. (D.C. N.Y., 1944), 55 F.S. 56, modified (C.C.A. 2d, 1946), 144 F. 2d 82.

CONCLUSION

There is no question that the trial court's award of damages was grossly inadequate under the undisputed evidence and the findings of injury, disability, and wage loss. This Court should experience no difficulty in fixing an adequate award and finally disposing of this case, because of the trial court's findings and the lack of conflicting evi-

dence. We respectfully submit that such an award should be in the amount of at least $96,000.00.

Respectfully submitted,

WILLIAMS & ALLEY,
DAVID R. WILLAMS,
Proctors for Appellant.